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8 **BURNS & MCDONNELL ENGINEERING
COMPANY, INC.**

9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 In re
13 PG&E CORPORATION
14 and
15 PACIFIC GAS AND ELECTRIC
COMPANY,
16 Debtors.
17

Case No. 19-30088 (DM)
Related Docket #5840

Chapter 11

**BURNS & MCDONNELL
ENGINEERING COMPANY, INC.'S
OPPOSITION TO MOTION TO
ESTABLISH PROCEDURES FOR
DISCOVERY PRECEDING PLAN
CONFIRMATION**

Date: March 10, 2020

Time: 10:00 a.m.

Place: Courtroom 17
450 Golden Gate Ave, 16th FL
San Francisco, CA 94102

21
22 Burns & McDonnell Engineering Company, Inc. (“Burns & McDonnell”) is
23 a non-party to the bankruptcy litigation involving PG&E Corporation and Pacific
24 Gas and Electric Company (“PG&E”), and files this Opposition to Motion to
25 Establish Procedures for Discovery Proceeding Plan Confirmation (“Opposition”)
26 in response to The Official Committee of Tort Claimants’ (the “TCC”) Motion to
27 Establish Procedures for Discovery Preceding Plan Confirmation (“Motion”).
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1 **I. INTRODUCTION**

2 **A. The Entities and the Dispute**

3 Burns & McDonnell is an engineering and construction company who
4 provides design and construction services throughout the world, including for the
5 power transmission industry in California. In this instance, Burns & McDonnell is
6 inappropriately being brought into the dispute between a group of individuals that
7 have alleged damages due to recent fires in California, the TCC, and their electrical
8 service provider, PG&E. In an attempt to pull as many parties, and more
9 importantly insurance policies, into the current litigation matter, the TCC issued
10 approximately 100 subpoenas to various entities that provided services to PG&E in
11 California. Despite the fact that Burns & McDonnell did not provide any
12 construction, repair, or vegetation management services to PG&E on the
13 transmission line out of which the wildfires at issue for the TCC arose, one of these
14 subpoenas was served upon Burns & McDonnell. This is a clear fishing expedition
15 on the part of the TCC.

16 Burns & McDonnell objected to the production of irrelevant and confidential
17 information from the subpoena. It then attempted to resolve the issues with the
18 TCC via a meet and confer process. However, the TCC did not provide any legal
19 reasoning to support its document request, and instead brought its Motion before
20 this Court seeking to create an unfair process by which the TCC may later force
21 Burns & McDonnell to produce privileged and confidential information within a
22 process that minimizes the TCC's required effort and costs. This process is not fair
23 and eliminates the majority of protections non-parties are provided under normal
24 discovery dispute procedures. As such, Burns & McDonnell requests that the Court
25 deny the Motion or at a minimum adopt the procedures recommended in this
26 Opposition.

27 ///

28 ///

II. ARGUMENT IN OPPOSITION TO MOTION

A. The Proposed Process is Deficient and Prejudices Burns & McDonnell

Burns & McDonnell takes exception to the truncated discovery dispute process proposed by the TCC, as it is prejudicial against Burns & McDonnell. The proposed process fails in the following regard:

1. The TCC is not required to justify the relevance of any documents sought;
2. The TCC is not required to provide specific legal reasoning for the requests in its meet and confer process or in the pleadings submitted to the Special Master;
3. Burns & McDonnell, a non-party, is only permitted to submit a “brief list of objections” in its pleading, without the ability to provide a detailed discussion or any case law to support its objections;
4. The TCC is only allowed to provide a brief response in its pleading, without legal citation;
5. The proposed process allows the TCC to lump multiple non-parties into a single motion which will obscure the deficiencies in TCC’s document requests as to Burns & McDonnell and preclude the entities from demonstrating how excessive burdens are being placed on those specific entities; and
6. Only a telephonic hearing is allowed based upon the truncated filings noted above.

These restrictions are improper for the following reasons.

1. The TCC must clearly establish the relevance of documents sought

The TCC’s Motion asserts that it served the subpoenas for insurance information “to obtain for the benefit of fire victims an understanding of the potential claims for which bankruptcy court jurisdiction will be reserved.” (Motion,

1 3:4-5.) However, the TCC's Motion failed to note any tie between the work of
2 Burns & McDonnell and the TCC members' damages. It is important to note that
3 the TCC must stand in the shoes of PG&E to assert the claims against Burns &
4 McDonnell that are assigned to the TCC in the bankruptcy. PG&E has not asserted
5 any claims against Burns & McDonnell, and the TCC has not asserted any claim or
6 theory of liability against Burns & McDonnell. As to Burns & McDonnell, the
7 TCC cannot show there is a relevance to the documents requested. *Pinehaven*
8 *Plantation Prop., LLC v. Mountcastle Family LLC*, 2013 WL 6734117 (M.D. GA.
9 2013) ["it is a generally accepted rule that standards for non-party discovery require
10 a stronger showing of relevance than for party discovery."] But, the TCC's
11 proposed procedures would not allow for a detailed review of these issues,
12 including no provisions for declarations, due to the "brief statements" only being
13 allowed in the proposed procedures. The TCC is attempting to have highly
14 privileged documents ordered to be produced without explaining through
15 declarations why such documents are relevant. This would prevent Burns &
16 McDonnell from adequately educating the Special Master regarding these potential
17 discovery dispute issues and would amount to a failure of due process and violation
18 of the Federal Rules of Civil Procedure discovery rules. (See FRCP, Rules 26(b)
19 and 45(d)(1) and (3), and *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir.
20 1998) [concern for the unwanted burden thrust upon non-parties is a factor entitled
21 to special weight in evaluating the balance of competing needs.] Any order of this
22 Court must have a procedure in which TCC establishes through a valid showing the
23 relevance of the documents sought.

24 **2. The TCC must be required to provide specific legal reasons**
25 **to produce disputed documents**

26 Counsel for Burns & McDonnell met telephonically with counsel for the
27 TCC in an attempt to resolve the dispute as to the documents to produce. During
28 the meet and confer process with Burns & McDonnell, the TCC's counsel provided

1 no legal citations or support for its subpoena categories dealing with the Insurance
2 Documents. The TCC's proposed procedures do not require or allow any legal
3 citations or reasoning to be submitted by TCC to support the subpoena requests.
4 (Motion, 5:1-3.) For example the proposed procedure for submission to the special
5 master provides:

6 No extensive argument or case law may be included, nor
7 any history of exchanges of emails, letters, etc.

8 Within 7 days, the TCC will send the Objecting party its
9 responses to the objections, also in list form, that includes
only a sentence or two briefly stating the basis for
overruling the objection.

10 The TCC will aggregate the objections from all Objecting
11 Parties that are pending at that time... into one list for
12 submission to the Special Master... No briefing shall be
included in the filing. (Motion, 4:26-5:9.)

13 The procedure put forth by the TCC in its Motion precludes both the TCC
14 and Burns & McDonnell from submitting any legal reasoning or citations in filings
15 to the Special Master. (Motion, 4:21-5:3.) This process prevents the Special
16 Master from having the pertinent law that would apply to the specific discovery
17 disputes at hand. The relevant law is critical to any discovery review by the Special
18 Master. Producing these Insurance Documents is prohibited by law, and the
19 relevant legal authorities should not be hidden from the Special Master.

20 An example of the importance of providing legal citations and reasoning is
21 the TCC's request for communications between Burns & McDonnell and its
22 insurance carriers and brokers. These communications involve discussions of
23 Burns & McDonnell's financial status and other business information of a highly
24 sensitive nature that constitute trade secrets and privileged communications.
25 *Futurecraft, supra*, at 289.

26 F.R.C.P. Rule 26(b)(3)(A) protects from discovery communication with a
27 party's insurer. That Rule states, in part:
28

1 Documents and Tangible Things. Ordinarily, a party may not discover
2 documents and tangible things that are prepared in anticipation of
3 litigation or for trial by or for another party or its representative
4 (including the other party's attorney, consultant, surety, indemnitor,
5 insurer, or agent). But, subject to Rule 26(b)(4), those materials may be
6 discovered if:

- 7 (i) they are otherwise discoverable under Rule 26(b)(1); and
- 8 (ii) the party shows that it has substantial need for the materials to
9 prepare its case and cannot, without undue hardship, obtain their
10 substantial equivalent by other means.

11 Here, the TCC seeks just such information, including “notices of claims,
12 tenders and coverage Communications – including but not limited to coverage
13 positions and insurance analyses – between You and any insurers for all such
14 insurance policies.” (Requests No. 10 and 12.) Even if Burns & McDonnell was a
15 party to this bankruptcy, such discovery would not be permitted under Rule 26. As
16 a nonparty, the TCC has an even greater burden. *Pinehaven Plantation Prop., LLC*
17 *v. Mountcastle Family LLC*, 2013 WL 6734117 (M.D. GA. 2013).

18 California courts have held that seeking insurance related information from a
19 non-party can create a chilling effect on discussions between an entity and its
20 insurance carriers. *Catholic Mutual Relief Society v. Superior Court*, 165 P.3d 154,
21 64 Cal. Rptr. 3d 434 (Cal. 2007). The Subpoena seeks to obtain insurance policies
22 (including Commercial General Liability, Errors & Omissions/Professional
23 Liability, Directors & Officers, Environmental/Pollution Liability insurance).
24 (Requests No. 4-7.) The requests seek not just the policies, but applications,
25 declarations, and endorsements. Insurance applications normally include financial
26 information, past claims history and other confidential and proprietary information
27 submitted to insurance brokers or agents, and underwriters for the purpose of
28 evaluating an insured’s risk profile. To require Burns & McDonnell, a nonparty, to
produce these Insurance Documents will have a chilling effect on the candor with
which insureds submit confidential information to insurance companies,
information which has absolutely no bearing on the bankruptcy of PG&E or the

1 claims of the TCC. The Courts recognize this extraordinary burden on a nonparty
2 and do not allow this type of production of documents especially from non-parties.
3 *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). By precluding
4 legal reasoning and citations from the proposed process, the Special Master would
5 not have the legal support to preclude such improper requests.

6 **3. Burns & McDonnell Must be Allowed to Submit Sufficient** 7 **Support for Objections to Document Requests**

8 The dispute procedure set forth by the TCC in its Motion only allows for a
9 “brief list of objections” by Burns & McDonnell, and allows the TCC “only a
10 sentence or two briefly stating the basis for overruling the objection.” (Motion,
11 4:21-5:3.) Given the burden on a non-party of producing documents and the risk of
12 producing confidential documents in a dispute it is not involved, precluding a full
13 review of the reasons for objections and the reasons to overcome an objection
14 would greatly reduce the understanding of the Special Master in evaluating any
15 discovery dispute. This uninformed review severely prejudices Burns &
16 McDonnell.

17 The subject matter of the TCC’s subpoena categories to Burns & McDonnell
18 highlights the problems with the TCC’s truncated procedure, where the TCC’s
19 requests seek insurance information of a non-party. Insurance forms involve
20 disclosures of financial and business strategy information that is not disclosed to the
21 public, and which is critical that it be kept confidential to maintain Burns &
22 McDonnell’s business strength in the market. If Burns & McDonnell’s competitors
23 were privy to this information, they could use it to reduce the effectiveness of Burns
24 & McDonnell’s business strategy. Thus, the material constitutes tightly guarded
25 trade secrets and confidential business information. *Futurecraft Corp. v. Clary*
26 *Corp.*, 205 Cal.App.2d 279, 289 (1962); *By-Buk Co. v. Printed Cellophane Tape*
27 *Co.*, 163 Cal.App.2d 157, 166 (1958). Therefore, a thorough discussion of the
28 reasons for objections to document request are necessary to fully define for the

1 special master the justification for denying a motion to compel these confidential
2 documents to avoid harm to Burns & McDonnell.

3 The TCC is attempting to sidestep the law pertaining to the production of
4 these types of documents. In essence, the TCC's procedure strips the normal
5 protections a non-party is owed in the discovery process, and eliminates the prudent
6 requirements put on a party seeking documents from non-parties to any litigation.
7 These protections and requirements were established to prevent the very harms that
8 are inherent in the TCC's proposed process.

9 The process as a whole will not allow sufficient information for any special
10 master to properly evaluate the disputes before directing non-party entities, such as
11 Burns & McDonnell, to produce irrelevant, confidential and privileged documents
12 that could create significant harm to Burns & McDonnell. The proposed process
13 will only serve to reduce the TCC's burden and costs at the expense and harm of
14 the non-party subpoena respondents such as Burns & McDonnell. As such, Burns
15 & McDonnell requests that the Court deny the TCC's Motion as to Burns &
16 McDonnell.

17 **B. The TCC's use of the Mediator as Special Master Creates a**
18 **Potential Conflict**

19 The TCC's Motion proposes to use Judge Newsome, who is acting as a
20 mediator in this matter, to act as the Special Master for the TCC's truncated
21 process. (Motion, 4:9-10.) A mediator's role in a dispute is to get the parties to
22 agree on a resolution of the matter. The mediator's only goal is to seek resolution
23 at a mutual settlement point the mediator feels he or she can get the parties to agree.
24 Thus, it is in the mediator's interest to bring as many parties together as possible, to
25 increase the potential pool of resources for settlement in part through added
26 insurance coverage.

27 Being forced to produce its insurance policies and communications will
28 greatly increase the possibility that the TCC will attempt to seek recovery from

1 Burns & McDonnell regarding the TCC's claims against PG&E. Being named in
2 an action such as the proceedings between the TCC and PG&E can create
3 significant legal expenses on an entity. While we are not stating that Judge
4 Newsome will have a bias towards granting motions to compel concerning non-
5 party insurance information, the mere potential for that bias and the potential
6 prejudice against Burns & McDonnell should direct the court to reject the
7 suggestion by the TCC to utilize Judge Newsome as a special master. Burns &
8 McDonnell proposes that a neutral special master be appointed, and that Judge
9 Newsome remain in his role as mediator.

11 **III. ALTERNATIVE PROCEDURE SUGGESTED**

12 Given the deficiencies in the procedure proposed by the TCC in its Motion,
13 Burns & McDonnell suggests the following alternative procedure:

- 14 1. A Special Master be appointed by the Court, who has not tie to the
15 mediation process in this matter;
- 16 2. That the parties meet and confer in good faith prior to any motion
17 being submitted to the Special Master to either compel production or
18 quash a subpoena. This process must include the subpoenaing party
19 providing a good faith argument that ties the relevance of the
20 documents sought with the documents requested, including legal
21 citations to support the production of documents. The Objecting entity
22 must provide substantive argument and legal citations and reasoning as
23 to why the documents are not relevant or which should be excluded
24 due to privilege or undue burden;
- 25 3. If the meet and confer process cannot resolve the discovery dispute,
26 then the subpoenaing party and the responding party are required to
27 file briefs to the Special Master, as allowed and required under the
28 Federal Rules of Civil Procedure, outlining the reasoning to either

1 produce documents or preclude documents for each category of
2 documents requested in the subpoena;

- 3 4. A telephonic hearing would then be held with the Special Master,
4 wherein each party may add its further argument in support of its
5 respective brief. The Special Master would then rule on the motion
6 filed.

7
8 **IV. NOTICE**

9 Notice is being provided to the following via email:

10 Baker & Hostetler LLP, 11601 Wilshire Boulevard, Suite 1400, Los Angeles,
11 CA 90025-0509, Attn: Eric Sagerman, Esq. and Cecily Dumas, Esq.

12 PG&E Corporation and Pacific Gas and Electric Company, 77 Beale Street,
13 San Francisco, CA 94105, Attn: Janet Loduca, Esq.;

14 Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153,
15 Attn: Stehen Karotkin, Esq, Jessica Liou, Esq, and Matthew Goren, Esq.;

16 Keller & Benvenuto LLP, 650 California Street, Suite 1900, San Francisco,
17 CA 94108, Attn: Tobias Keller, Esq., and Jane Kim, Esq.;

18 Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, NY 10038-
19 4982, Attn: Kristopher M. Hansen, Esq., Erez E. Gilad, Esq., and Matthew G.
20 Garofalo, Esq.;

21 Stroock & Stroock & Lavan LLP, 2029 Century Park East, Los Angeles, CA
22 90067-3086, Attn: Frank A. Merola, Esq.;

23 Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017,
24 Attn: Eli J. Vonnegut, Esq., David Schiff, Esq., and Timothy Graulich, Esq.;

25 Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the
26 Americas, New York, NY 10019-6064, Attn: Alan W. Kornberg, Esq., Brian S.
27 Hermann, Esq., Walter R. Rieman, Esq., Sean A. Mitchell, Esq., and Neal P.
28 Donnelly, Esq.;

1 Office of the United States Trustee for Region 17, 450 Golden Gate Avenue,
2 5th Floor, Suite #05-0153, San Francisco, CA 94102 (Attn: James L. Snyder, Esq.
3 and Timothy Laffredi, Esq.;

4 U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attn:
5 General Counsel.;

6 U.S. Department of Justice, 1100 L Street, NW, Room 7106, Washington DC
7 20005, Attn: Danielle A. Pham, Esq.;

8 Milbank LLP, 55 Hudson Yards, New York, NY 10001-2163, Attn: Dennis
9 F. Dunne, Esq. and Sam A. Khalil, Esq.;

10 Milbank LLP, 2029 Century Park East, 33rd Floor, Los Angeles, CA 90067,
11 Attn: Paul S. Aronzon, Esq., Gregory A. Bray, Esq., and Thomas R. Kreller, Esq.

12
13 **V. CONCLUSION**

14 For all of the above reasons, Burns & McDonnell requests that the Court
15 deny the TCC's Motion or substantially alter the proposed procedures. Burns &
16 McDonnell requests that any order issued by this Court follow the suggested
17 procedures herein.

18 Dated: March 3, 2020

PEPPER HAMILTON LLP

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